THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. AND-19-491

Adoption by Jessica M. et al.

ON APPEAL from the Androscoggin County Probate Court

BRIEF OF APPELLEES

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A. General Introduction.

Appellees, aunt and uncle , are the maternal aunt and uncle and guardians of child (d/o/b). (1Tr. 148). Appellants father and mother are child's biological parents, who were incarcerated at child s birth. (2Tr. 43; 3Tr. 114).[1] child initially was in the custody of the Department of Health and Human Services ("DHHS") and, until age two, was placed in the care of his maternal grandmother, .[2] father and mother have extensive backgrounds relevant to this matter. father testified to being arrested approximately 41 separate times and having at least 22 convictions prior to the conviction for which he is currently serving time. (3Tr. 190). father admitted at trial that his use of crack cocaine has spanned over thirty years and he has relapsed repeatedly. (3Tr. 156, 217-18). He admitted smoking large quantities of crack cocaine, driving a motor vehicle while high on crack, and using "crack when child was in their home asleep." (3Tr. 156, 189-90; 3Tr. 123). In 2015, father was indicted on federal felony charges for "conspiracy to distribute cocaine . . . and maintaining a drug-involved premises . . ." (Pet'rs' Ex.

[1] At birth, cocaine was found in child 's system. (Pet'rs' Ex. 18C).
[2] grandmother previously adopted mother 's two other children. (2Tr. 35, 43, 81).

16B). For about 30 days until the end of March, father was in custody. (3Tr. 132). In January 2017, he was sentenced to 60 months in prison. (Pet'rs' Ex. 16E).

In the child protective action relating to child jeopardy was found as to mother based on the termination of her parental rights to her two other children, chronic substance abuse problems, significant mental problems, psychiatric hospitalizations, domestic violence resulting in police involvements, unstable housing, lack of follow-through with rehabilitative services, and lengthy history of criminal involvements and convictions. (Pet'rs' Ex. 18D).[3] mother left the State of Maine in 2011. (2Tr. 38).[4] mother's only contact with child since she left Maine, was some very limited video chat communication with child years ago. (2Tr. 236-37; 3Tr. 156-57).[5] child testified that he knows who his mom is, but does not recall the last time he saw her in person, has little recollection of his mother, and was ambivalent about his interest in future contact with her. (2Tr. 236-37, 270).[6]

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[3] The unrebutted evidence at trial was that mother has had an active history of substance abuse, significant mental health issues, domestic violence relationships, and suicidality, and has never had stable housing or regular employment. (2Tr. 36, 39-42, 126).

[4] father testified he never let mother visit child and as far as he knew, she had never been in the same space as child (3Tr. 157). grandmother testified that mother's criminal history dates back to her teen years, and she could not recall a time since then in which mother had gone more than a year without spending time in jail. (2Tr. 36-37).

[5] Since June 2016, mother has not contacted or attempted to contact child by phone or letter, with the exception of a 2017 letter dated May 26, 2017, and a birthday card sent in November 2018. (1Tr. 192-94; 2Tr. 56, Pet'rs' Ex. 3; mother Ex. 4).

[6] He does not currently want to write to her or have her write to him. (2Tr. 272).

B. father's Supervision of child from 2009 to 2013.

child, who is 12 years old, has lived only about half of his life with father In 2008, the district court found jeopardy as to father based on father's chronic substance abuse problem, prior child protective involvement, and criminal history, including a recent felony drug furnishing conviction. (Pet'rs' Ex. 18C). Thereafter, father was granted custody of child in late 2009, when child was then age two. (3Tr. 116). The court entered a Parental Rights and Responsibilities Order awarding father sole parental rights and discretion over child's contact with mother (Pet'rs' Ex. 18E). From late 2009 to 2013, child resided with father in . (3Tr. 117-18). They moved to in 2013, residing in two different apartments, until May 2016 when father left child in the care of grandmother [7] (2Tr. 60; 3Tr. 163-64, 195).

father eventually relapsed on crack cocaine, and was later indicted on a federal charge of conspiracy to distribute and possess with intent to distribute 280 grams or more of cocaine base, and a charge of having knowingly leased, rented, used and maintained, permanently or temporarily, an apartment located at Street in , Maine, [8] for the purpose of unlawfully distributing and using controlled substances, including cocaine base, and did aid and abet such conduct. (Pet'rs' Ex. 16B; 3Tr. 113, 172). Both charges related to activity beginning

[7] grandmother testified that child came into her care on Memorial Day weekend 2016; others referred to the transfer of care as occurring in early June 2016.

[8] father testified that he and child resided at (3Tr. 163).

no later than January 1, 2010 until August 30, 2013. (Pet'rs' Ex. 16B). father only received treatment for his relapse when DHHS became involved, after father left child in the care of S.N. , an unsafe caregiver.[9] (3Tr. 157-58).[10] father returned to for drug rehabilitation in 2013, leaving child with his godparents. (2Tr. 243-44). father did not continue in any formal substance abuse treatment after . (3Tr. 159). He only eventually engaged in treatment with J.S., LADC, in 2015, after he was so mandated by the federal court. [11] (2Tr. 6, 20-21; 3Tr. 160).[12] father testified that once he moved to in 2013, he was no longer using drugs, he had the support of community members through his church, and "life was good." (3Tr. 129, 191-93).[13]

C. Child's Regression While Being Supervised by father

From 2013 to 2016, child attended kindergarten through second grade at Elementary School. (Pet'rs' Ex. 5A-G). His attendance, though, was very poor.[14] Child's first and second grade teachers testified child 's attendance impacted him academically and socially. (1Tr. 62-64, 105-06). He did not have many friends.

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[9] father now sees that "[he] made a bad decision" leaving child in S.N.'s care. (3Tr. 158).
[10] The godparents had child sleep in a dog bed. (2Tr. 243-44).
[11] J.S. testiied that father produced a positive drug test during her work with him (2Tr. 24), though father had conditions of release that prohibited any drug use (Pet'rs' Ex. 16C-D; 3Tr. 162).
[12] J.S. testiied that at the time father started treatment with her, the length of his use was greater than the time he had been sober. (2Tr. 24, 26).
[13] He acknowledged that his time in was a period of relative stability f or him. (3Tr. 192).
[14] child 's school records reflect that he had approximately 28 absences in kindergarten, 17 in first grade, and 35 in second grade, and he was f requently tardy. (Pet'rs' Ex. 5A-G; 1 Tr. 62-63). father apparently "sees how he 'dropped the ball' by allowing child to miss too much school, particularly during the 2013-2014 school year." (father Blue Br. 7).

(1Tr. 76). He was disorganized, did not complete his homework, came to school disheveled, and would fall asleep in class at least twice per week. (1Tr. 62-64, 66, 108-09, 127; Pet'rs' Ex. 5F; 1Tr. 106-08, 126).[15] While child was living with father he regularly visited grandmother and spent major holidays with her. (2Tr. 44-46, 90, 96). grandmother was concerned by his behavior, attitude, hygiene, academics, and lack of basic life skills. (2Tr. 48-52).[16] When she addressed her concerns with father he would say, "I'm more of a friend sometimes than a father." (2Tr. 48). He told her that child was doing great in school. (2Tr. 54). During one of child's visits with grandmother, child and his brother found pornographic pictures on child's kindle, which father admitted were his. (2Tr. 53-54).

Contrary to father's assertions, child was behind academically in nearly all areas while in his father's care. (1Tr. 64-65, 105). His teachers made efforts to address their concerns with father but often struggled to reach him, and when they did, there was never any lasting change. (1Tr. 67-68, 90-91, 110-112, 122, 126, 128). Despite child's academic struggles, father cut child's school year short without communication with child's teacher in order to leave him with his grandmother in May 2016, many weeks prior to when father reported to prison on July 21, 2016.

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[15] It was recommended that father look into occupational therapy screenings for Child (Pet'rs' Ex. 5F).
[16] aunt and uncle regularly visited with Child when he was in Grandmother's care, and they also had concerns that Child was quick to anger, lacked basic lifeskills, and had poor hygiene and untreated medical issues. (1Tr. 153-57; 3Tr. 18-19).

(1Tr. 114; 2Tr. 44, 62; 3Tr. 133, 195-96). He gave Grandmother just a couple days' notice that child would be staying with her. (2Tr. 60).[17]

D. Father's Felony Conviction and Incarceration.

In early 2015, father was indicted on federal felony charges, and he went to prison for approximately 30 days, leaving child in the care of his landlords,

. (2Tr. 242; 3Tr. 132). child witnessed father arrest by federal agents. (2Tr. 238). While in the Landlord's care, child completed his homework, improved in his reading, and was better prepared for school. (1Tr. 69-70). From March 2015 to July 2016, father was on house arrest, which restricted him to his residence except for employment, education, religious service, medical, substance abuse, or mental health treatment, and the like. (3Tr. 192-93; Pet'rs' Ex. 16C-D). On January 23, 2017, the United States District Court entered a Judgment adjudicating father guilty of a Class A felony of conspiracy to distribute and possess with intent to distribute 280 grams or more of cocaine base. (Pet'rs' Ex. 16E; 3Tr. 172). The federal court sentenced father to 60 months in prison followed by three years of supervised release. (Pet'rs' Ex. 16E).

[17] father incorrectly states that he left child with grandmother "informing her of that decision just a few days before he entered federal custody." (father Blue Br. 10). It was nearly two months later that he entered federal custody. (3Tr. 133, 195-96).

E. Relevant Trial Testimony in This Matter.

At trial, admitted being involved with the gang. (3Tr. 186). He testified that he used cocaine every day, including in his apartment when child was there, that he was a "go-between" for others who were using, that he was dealing crack, and that child may have been exposed to unsafe people. (3Tr. 121-23, 186-87, 190). Despite his admissions, father testified that child "never, not once" saw an unsafe situation while in his care. (3Tr. 124). father admitted that when child would ask to stay home from school, he would not make him go, thoughchild's teachers expressed concern to him that child's absences were impacting his education. (3Tr. 129, 167). father acknowledged that child probably was exhausted and falling asleep in class because he was up late. (3Tr. 195). father also testified that child "might have been tardy a few times," but was not regularly absent from school. (3Tr. 193-94).

child has some happy memories of the time he lived with his father, such as walking to school, playing video games, and watching movies. (2Tr. 240). He also testified, however, that his father did not tell him why he was going to live with his grandmother in May 2016, and did not say how long he would be gone for. (2Tr. 238). He testified that he sometimes missed school because his dad slept in late (2Tr. 241). Sometimes his dad would send him to school in a cab by himself after he missed the bus. (2Tr. 242). He recalled the time his dad left him in the care of

S.N. and the police came and removed him and other children, and he did not know where his dad was. (2Tr. 246-47). He recalled his father leaving him with another babysitter in , who got drunk, broke into a neighbor's house, and had child hold items as she stole them. (2Tr. 248). He witnessed her arrest. (Id.). He testified that his father left him with that same babysitter again after that incident. (Id.). He recalled a time when all of his and his father's possessions disappeared from their apartment and his dad thought people that knew him had broken in and stolen from them. (2Tr. 249). He recalled witnessing his father be arrested on at least two occasions. (2Tr. 238, 247).

At trial, father testified that he had no concerns for child's development or when he left him in grandmother's care in 2016. (3Tr. 165). However, when child returned to grandmother's care, he continued to lack many life skills, including but not limited to, brushing his teeth, buttoning his shirt, properly holding utensils, tying his shoes, riding a bike, running, and blowing his nose. (1Tr. 157, 160-63; 3Tr. 21-22). He also was prone to anger outbursts, lacked confidence, was very shy, and struggled socially. (1Tr. 165-167; 3Tr. 18-19). He did not know how to maintain proper hygiene. (1Tr. 162).

F. aunt and uncle Take Care of child's Best Interest.

Over the next year, child spent a significant amount of time with the aunt and uncle, including most weekends, as they tutored him. (1Tr. 149; 3Tr. 19-20).

After it became clear how long child would be with them, grandmother, aunt and uncle believed that it would be in child's best interest to reside with the aunt and uncle, and they sought father's permission. (1Tr. 150-52). In April 2017, father executed a power of attorney to the aunt and uncle. (Pet'rs' Ex. 10). In May 2017, child moved in full-time with the aunt and uncle, and they were granted guardianship of him in January 2018. (1Tr. 149; 2Tr. 73).

father was unable to give the aunt and uncle child's past medical information. (1Tr. 171). Similarly, at trial, father was unable to name child's medical and dental providers.[18] (3Tr. 164-66). child recalled seeing a dentist just once while in his father's care, and father testified that child did not see a dentist during the three years they lived in . (2Tr. 252; 3Tr. 165-66). child 's medical records reflect that, while in father's care, he had no well child checks after age four and had minimal medical attention. (Pet'rs' Exs. 8, 9). When child came to live with his maternal relatives in 2016, he had an untreated skin condition, stomach and constipation issues, foot pain, and vision issues, all of which conditions were resolvable with medical attention. (2Tr. 251-52; 3Tr. 21). Yet, father did not "know of" any medical concerns with child when he left him with grandmother (3Tr. 165).

[18] father testified "[child didn't go [to the doctor] regularly," though father says he brought him to the hospital when he was sick. (3Tr. 165).

child is thriving in the care of aunt and uncle . He comes to school prepared, has progressed academically, and has no attendance issues. (1Tr. 44, 159, 164). He is engaged in sports, which have helped him to grow physically, emotionally, and socially. (1Tr. 136-38, 166-67). He has had extensive tutoring, is in counseling, is working with an occupational therapist, and now wears glasses and orthotics. (1Tr. 149, 157-58, 163, 168, 178; 2Tr 251). The aunt and uncle have provided child a structured and safe home environment, are actively engaged in all aspects of his life, and are meeting his needs. (1Tr. 44, 140-41, 158-63, 177-80; (father Blue Br. 35). They have been his parental figures for nearly three years, and child is closely bonded to them. (See, Pet'rs' Ex. 4A-F; 1Tr. 51, 141, 181).[19]

G. father Sporadic Communication with child

While child was living with grandmother for nearly a year, from June 2016 to May 2017, child received a few letters from his father, and father called two or three times. (2Tr. 68-71, 119). child did not seem interested in talking with his father when he called. (Id.). After child first came into the care of the aunt and uncle in May 2017, they paid for a texting service and encouraged phone calls and letters between child and father (1Tr. 188).[20]

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[19] aunt and uncle have also ensured child's continued connection with grandmother and his half-siblings. (1Tr. 183-84).

[20] aunt also sent father pictures of child and twice planned trips to bring child to visit father though neither ended up occurring. (1Tr. 211, 217-18). They cancelled the first trip because father was in solitary, and the second because child shut down when aunt tried to discuss a possible visit with him. (1Tr. 217-18).

However, shortly after child came into the aunt and uncle's care, during the summer of 2017, father went into solitary confinement for approximately three months for his safety because he could not produce "papers" to prove he was not a snitch. (1Tr. 189; 2Tr. 205; 3Tr. 214-15). father did not contact child during the time he was in solitary confinement, though he could have written to him.[21] (1Tr. 197; 3Tr. 203-04). After he got out, his communication with child was sporadic, with maybe a handful of phone calls the remainder of the year. (1Tr. 197; 3Tr. 28). father returned to solitary confinement in January 2018, after he was found with a knife in his shoe. (1Tr. 197; 3Tr. 146).

In 2018, father called and spoke to child just three times; in 2019, just twice. (1Tr. 198; 3Tr. 28). The phone calls typically lasted two to three minutes each. (1Tr. 199). father testified in August 2019 that he had not spoken to child in months. (3Tr. 136). father offered vague claims that "I try calling. I try writing letters," but could not say how many times he had tried to call without reaching someone.[22] (3Tr. 136-37). father also testified that phone calls were costly, and his attempts to call were

[21] father believes he may have written to a friend, C.B., from solitary. (Id.).

[22] The records does not support father's assertion that his "call records for early 2019 suggest that he called [aunt more often than her testimony suggests," (father Blue Br. 13), and "[father believes he called [aunt s] phone at least fifteen times during the first three months of 2019" (Id. 15). father did not offer any call records, nor did he testify that he believed he made "at least fifteen" attempts to call child father relies on his attorney's questions on cross-examination of aunt and uncle , though both witnesses denied suggestions that father had attempted more calls. (2Tr. 178-79; 3Tr. 56-57). father did not testify to the purported phone records or the timing or number of his purported additional efforts to call.

limited.[23] (3Tr. 137). father admitted that he promised child during many of the calls that he would call him weekly, a promise he never came close to keeping. (1Tr. 203; 2Tr. 216; 3Tr. 210). Despite father's professed limitations on communication, he still has been able to regularly contact his friend, E.B., twice per month. (3Tr. 107). He also was able to call aunt almost weekly when he wanted her to try to get documents for him. (1Tr. 195-96).

H. child Limits Contact with father

child has rarely chosen to contact his father. (1Tr. 212-16; 2Tr. 253). After father got out of solitary confinement in 2017, the aunt and uncle noticed that child would "shut down," withdraw, or have a setback when he got a call or text from father (1Tr. 201-02, 205; 2Tr. 173-75, 190, 210, 213-14; 3Tr. 29; father Ex. 25 at 3). They preferred communication by letter because it would give child the time to process father's message before responding, rather than feeling put on the spot to respond. (2Tr. 173; 3Tr. 49, 59). father himself testified that he could tell child was uncomfortable talking with him on the phone. (3Tr. 150).

In spring 2018, the aunt and uncle made the decision to stop paying for the texting service, based in part on how child reacted to father's messages.[24] (1Tr. 202;

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[23] father asserts that "[a]ll means of communication from prison cost [father money." (father Blue Br. 15). But, father testified that it cost him money to send text messages and make phone calls; he did not testify that it cost him money to send letters. (3Tr. 137, 212). There was no testimony about the amount or frequency of funds received by father beyond what he had received most recently. (3Tr. 203).

[24] They were also intrusive because of a delay that resulted in aunt sometimes receiving texts from father in the middle of the night. (1Tr. 202; 2Tr. 166-67).

3Tr. 29, 49). In the months leading up to that decision, father's texts to child were sporadic, and often weeks, even months, would go by between texts.[25] (1Tr. 203, 206-07; 3Tr. 70, 211-12; See also father Exs. 8-10, 12, 14, 16-19, 21, 23, 26). Though child was free to initiate contact with father via text and letter, he did not. (1Tr. 212; 3Tr. 30). child testified that he felt he could reach out to his father whenever he wanted to, and it has been his choice not to write more. (2Tr. 253).

Only after father was served with discovery requests in October 2018, did he attempt to email child through an account previously used only to communicate with aunt .[26] (1Tr. 207-09). A few emails came in rapid succession after father had made no contact since a phone call six months earlier and a text four months earlier, and without explanation for his absence. (Id.). The made the decision to close the email account, but continued to support communication between father and child by letters and phone calls. (1Tr. 208; 2Tr. 170). father never indicated to aunt that there were any limitations on his ability to write letters. (2Tr. 215).

Between May 2017 and the last day of trial in August 2019, the aunt and uncle received just four letters from father to child all of which were sent after father was served with discovery in October 2018.[27] (1Tr. 210-11). In that same period of over

[25] father acknowledged that in the last four months he was able to text child he sent just four text messages to child each several weeks apart. (3Tr. 212).
[26] child does not use email. (2Tr. 170).
[27] father asserts that he "began to write letters to child with more frequency" after October 2018, and cites to Petitioners' Ex. 1A-E. (father Blue Br. 15). The letter in Exhibit 1A was written by father to child while

two years, child did not choose to write to his father, with the exception of one Father's Day letter, written at aunt 's urging in 2017. (1Tr. 215-17).

I. The Uncertain and Unpredictable Future for father

Father is scheduled to be released from prison in November 2020. (3Tr. 143). He testified that after he gets out of prison, he will not be in a position to meet child's needs for at least two to three years. (3Tr. 230). He intends to live in a half-way house initially, and then go to school, while also working full-time, to save money to support child (3Tr. 215, 229-31). He testified he will also need to find a place to live and get "a ton of other things" in place before he could care for child (Id.).

Prior to his incarceration, with the exception of playing with his band and maybe one other job at Margarita's, father has not worked since child was born, and up until his incarceration, he was receiving Social Security disability benefits. (2Tr. 244; 3Tr. 201-02, 231). Those benefits were awarded to him at least in part due to his diagnosis of Post-Traumatic Stress Disorder, which he claims has resolved, despite no formal mental health treatment. (3Tr. 169-71). Additionally, father will be on supervised release for three years with stringent conditions. (3Tr. 168). Contrary to his testimony at trial, father has made statements to

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child was in the care of grandmother in 2016 or 2017 (2Tr. 115), and Exhibit 1E was a letter written to aunt , not to child father's Exhibit 31 was not received by aunt and uncle . (3Tr. 140).

aunt and uncle , and E.B. that reflect his intent to have child return to his care following his release from prison. (Pet'rs' Ex. 1B; 2Tr. 150-51; 3Tr. 31-32, 108).[28]

father has not taken ownership for his actions. In April 2018, father wrote a letter to aunt in which he wrote that "[child lived a normal life up until he was 6 years old," and described his criminal history as "a series of minor offenses." (Pet'rs' Ex. 1E). father testified at trial that he felt he was being "stripped of" his parental rights "for no reason." (3Tr. 151).

J. child's Preference Relating to child's Best Interest.

child testified that he wants the court to know that he is "really happy" about the aunt and uncle seeking to adopt him, and he wants them to adopt him. (2Tr. 254-55). child testified maturely and without equivocation and indicated that he did not feel that his opinion was influenced by anyone. (Id.). child worries that when father gets out, he will have to leave his current home and live with father again, though he understands father could not just come take him. (2Tr. 260, 273, 276). He testified to the structure that the aunt and uncle provide, their expectations for him, and the certainty they can provide to him for his future. (2Tr. 234-35, 76). He has expressed his love for them and appreciation for the life they are providing for him. (See Pet'rs' Ex. 4A-F).

[28] In the midst of father's October 2018 letter to child the first letter he wrote to his son in over 18 months—he addressed aunt directly, saying he would not give up his son like "a mere possession," and told child "I promise you that when I get home you and I shall be together." Pet'rs' Ex. 1B.

Procedure

Appellees filed the Petition for Termination of Parental Rights, seeking to terminate the rights of Appellants father and mother in connection with their Petition for Adoption of child on March 26, 2018.[29] A trial was held on the amended petition over three days: April 10, April 11, and August 13, 2019, concluding nearly 17 months after the filing of the petition. (A. 3-4). mother was incarcerated in during the first two days of trial and participated via Skype. (1Tr. 3-4, 9; 2Tr. 3). mother was released from jail prior to the third day of trial, but did not attend in person, instead participating by Skype and telephone from . (3Tr. 4-6). father was incarcerated in federal prison in throughout the trial and participated by telephone. (1Tr. 3; 2Tr. 3; 3Tr. 112). He did not request an order to transport him in person to the hearing.[30] At the pretrial conference on August 21, 2018, counsel addressed the prospect of the incarcerated parties appearing by video at hearing, and the court charged father's attorney to explore options for that. (A. 2). father's attorney had nearly eight months to work out the logistics to ensure father's availability by video, but as of the first day of hearing, video was not available. (1Tr. 5, 19). It was only on the first day of trial that father

[29] Appellees amended their petition on June 18, 2018. (A. 2).

[30] father refers to a letter he filed *pro se* on May 25, 2018, in which he requested a continuance of the hearing set for June 5, 2018, because he needed an attorney, and "[b]eing incarceration, I would need to be ordered to appear at said hearings [sic]." (father Blue Br. 2; father letter to court filed 5/25/18). The court appointed counsel to father and at no time thereafter did he or his attorney request that father be transported for the final hearing.

attorney indicated that a request to use the district court to accommodate video participation needed to come from the probate court. (1Tr. 33).

The court determined that telephone participation was meaningful. (1Tr. 31). The court gave both Appellants' counsel opportunity to communicate with their respective clients throughout the hearing by clearing the courtroom after each witness's direct and cross examinations to allow counsel to confer privately with their clients. (Id.). The court agreed to keep the record open to allow Appellants' counsel opportunity to try to arrange for video participation during the presentation of their case. (1Tr. 32). At the close of the second day of trial on April 11, 2019, the court directed father's attorney to inquire with the district court as to whether its system was compatible with the federal prison system, and if so, the court would coordinate with the district court to hold the remainder of the trial there. (A. 4). By notice dated July 16, 2019, the court set a third day of trial, and in that notice, the court ordered: "If any party needs to participate telephonically or by video, you must get the correct information to the Court by July 30, 2019, so that we may make the necessary arrangements." (Court scheduling notice dated 7/16/19). By the third day of trial, no arrangements had been completed to allow for father's participation by video. (A. 4; 3Tr. 3, 11). The court denied father's request to continue the trial so that his attorney could "continue to work on the technology issues." (1Tr. 9, 12). The court allowed father to participate by telephone with regular breaks to allow his

counsel to confer with him. (1Tr. 12). On November 19, 2019, the probate court issued an order terminating father's and mother's parental rights. (A. 6-9).

SUMMARY OF ARGUMENT & STANDARD OF REVIEW

Summary of Argument

This Honorable Court should affirm the order of the probate court and remand this matter to the probate court for finalization of the adoptions. The probate court was within its powers to take judicial notice and/or admit a federal sentencing transcript at trial; moreover, even assuming *arguendo* that it was in error or an abuse of discretion, it was harmless. Additionally, father was not deprived of due process by the probate court's denial of his request to continue the trial to allow for a potential future appearance via video. Lastly, the probate court had sufficient evidence to support its findings of parental unfitness and the best interest of the child and its decision to terminate the Appellants' parental rights.

Standard of Review

The Law Court reviews the evidentiary rulings of a lower court for an abuse of discretion or clear error. See Banks v. Leary, 2019 ME 89, ¶ 9, 209 A.3d 109, 113. The standard applied depends on whether the lower court's ruling was based on relevancy or admissibility of the disputed evidence. See State v. Filler, 2010 ME

90, ¶ 14, 3 A.3d 365, 369–70. Both are subject to a harmless error analysis. See State v. Mills, 2006 ME 134, ¶ 8, 910 A.2d 1053, 1056.[31]

The Court reviews factual findings underlying a termination of parental rights order for clear error and the ultimate decision to terminate parental rights for an abuse of discretion. Adoption of Isabelle T. et al., 2017 ME 220, ¶ 30, 175 A.3d 639. The Court will determine that a finding is unsupported only if there is no competent evidence in the record to support it; if the fact-finder clearly misapprehended the meaning of the evidence; or if the finding is so contrary to the credible evidence that it does not represent the truth of the case.[32] Id. (citation omitted). Finally, the Law Court reviews "de novo whether an individual was afforded procedural due process." In re Adden B., 2016 ME 113, ¶ 7, 144 A.3d 1158, 1160.

ARGUMENT

I. THE FEDERAL COURT SENTENCING TRANSCRIPT WAS ADMISSIBLE AND NOT PREJUDICIAL TO APPELLANT father

The court may take judicial notice of "a fact that is not subject to reasonable dispute" because it is either "generally known within the trial court's territorial

[31] "Discretion in rulings on evidentiary issues 'is considered abused ... if the ruling arises from a failure to apply principles of law applicable to a situation resulting in prejudice.'") Id.; See also State v. Sargent, 656 A.2d 1196, 1199 (Me. 1995)(citation omitted)("The decision to admit or exclude evidence is more frequently reviewed under an abuse of discretion standard 'because the question of admissibility frequently involves the weighing of probative value against considerations militating against its admissibility.'").

[32] When a trial court enters a judgment based on findings of fact, and no additional findings of fact are requested pursuant to M.R. Civ. P. 52(a), this Court "will infer that the court made all the necessary findings of fact to support the judgment, if those findings are supported by evidence in the record." Lyons v. Baptist Sch. of Christian Training, 2002 ME 137, ¶ 37, 804 A.2d 364, 375.

jurisdiction" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." M.R. Evid. 201(b). Further, a court may "admit pertinent *findings* made in a different proceeding if those findings meet the requirements of collateral estoppel." Cabral v. L'Heureux, 2017 ME 50, ¶ 11, 157 A.3d 795, 798. Notwithstanding, assuming arguendo that a court has improperly taken judicial notice and/or admitted evidence otherwise not admissible, such actions are not an abuse of discretion if there is no harm. See generally In re Rachel J., 2002 ME 148, ¶ 14, 804 A.2d 418, 423.

A. The probate court did not improperly admit and/or take judicial notice of the federal court sentencing transcript.

father argues the court's taking of judicial notice of Judge Woodcock's findings placed on the record at father's sentencing hearing and/or the admission of the sentencing transcript was an error of law and an abuse of discretion. (father Blue Br. 22-29).[33] Maine courts have applied judicial notice to a wide variety of indisputable facts. See generally M.R. Evid. 201(b); see also Field & Murray, Maine Evidence, § 201.2 at 55-57 (6th ed. 2007). Courts may take judicial notice of pleadings, dockets, and other court records where the existence or content of such

[33] Additionally, father argues, for the first time, that the sentencing hearing findings are inadmissible because the transcript was not authenticated. "It is a well settled universal rule of appellate procedure that a case will not be reviewed by an appellate court on a theory different from that on which it was tried in the court below." Teel v. Colson, 396 A.2d 529, 534 (Me. 1979); see also KeyBank Nat'l Ass'n v. Estate of Quint, 2017 ME 237, ¶ 22, 176 A.3d 717, 723. At trial, father's counsel did not raise this objection because counsel had stipulated to Appellees' counsel that she would not object to the transcript on those grounds.

records is germane to an issue in the same or separate proceedings. See Finn v. Lipman, 526 A.2d 1380, 1381 (Me. 1987); Union Mut. Fire Ins. Co. v. Town of Topsham, 441 A.2d 1012, 1016 (Me. 1982). Even when findings from an earlier proceeding were subject to a less stringent burden of proof, judicial notice can be taken of the prior findings in a termination proceeding; but, the court "must independently assess all facts presented and be confident to a clear and convincing standard that the evidence taken as a whole is sufficient" to meet the higher standard of proof. See generally In re Scott S., 2001 ME 114, ¶ 14, 775 A.2d 1144, 1150.

The court was within its authority to take judicial notice of findings by Judge Woodcock in father's sentencing hearing. Judge Woodcock made pertinent findings in a separate proceeding, and those findings met the requirement of collateral estoppel, as the court was not charged with deciding father's guilt or sentence. Rather, the court could consider the findings by Judge Woodcock in relation to their effect on the court's determination of father's fitness and child's best interest. Prior to issuing his findings, Judge Woodcock stated that, "There are no disputed matters." (Id., pg 25). The court was clear that anything in the transcript relating to "argument by counsel, et cetera" was excluded, and took judicial notice of the transcript only as it related to the federal court's findings on the record. (A. 17, 20). Ostensibly, this would also include any facts presented to Judge Woodcock that were deemed

admissions by father if father reviewed such facts (independently or with counsel) and did not dispute said facts.[34]

B. Assuming, arguendo, the probate court did improperly admit and/or take judicial notice of the federal court sentencing transcript, such acts were harmless.

"Discretion in rulings on evidentiary issues 'is considered abused . . . if the ruling arises from a failure to apply principles of law applicable to a situation resulting in prejudice.'" State v. Mills, 2006 ME 134, ¶ 8, 910 A.2d at 1056. Further, in a termination of parental rights proceeding, an error is harmless if "it is highly probable that the error did not prejudice the parents or contribute to the result in the case." In re Scott S., 2001 ME 114, ¶ 29, 775 A.2d at 1154.

1. father's arguments are speculative in nature.

father argues that there is a "reasonable probability" that the admission of the sentencing transcript affected the outcome. (father Blue Br. 1). He speculates by suggesting that as "a result of the court's ruling, it is *impossible to know for sure* which findings the court considered," but there were a "few it viewed and *might have* considered." (father Blue Br. 18)(emphasis added). father's argument is unavailing, speculative, outright ignores the substantial amount of evidence supporting the probate court's ruling, and fails to demonstrate any harm to father

[34] At federal sentencing hearings, the federal judge routinely engages in a colloquy with the Defendant to confirm with the Defendant that he has read the presentence investigation report and reviewed it with his attorney, and to give the Defendant an opportunity to comment on or object to the information contained within the report. See Fed. R. Civ. P. 32(d)-(i).

Although father lists various findings from the sentencing transcript that the court *may* have viewed and/or considered, father fails to demonstrate that the court did in fact rely in any manner on *any* of those specific findings. Further, father completely fails to indicate how the other significant admissible evidence at trial was so different from these specific findings that the outcome would have been different. Many of the facts from the transcript that father worries the court *might* have considered were corroborated by father's own testimony and/or other documents. For example, father admitted to his involvement with the gang,

that he was dealing crack cocaine in in 2012 or 2013, and that he has driven a vehicle high on crack. The conspiracy to distribute crack and heroin and deal illegal firearms is detailed in the indictment.

father also argues that the transcript *might* have impacted the court's assessment of father's credibility, pointing out that "Petitioners invited the court" to consider the transcript "for purposes of impeaching [father testimony at trial." (father Blue Br. 27). However, there is simply no evidence demonstrating that this "invitation" was considered by the court, or that the significant other admissible evidence at trial did not result in the same effect. The court made no findings with respect to father's credibility, and there is no indication that the court discredited his testimony. In fact, the court credited father's testimony with respect to when he anticipates being able to care for child again. (A. 8). The court's order does not cite

in any way to the sentencing transcript, nor does it contain any findings based on evidence contained only within that transcript. While the court did adopt many findings proposed by Petitioners, the court declined to make any of the findings proposed by Petitioners based on the transcript. There is absolutely no evidence that the court relied in any way on the transcript, and even if it did, there is no evidence that it resulted in any harm to father

2. There exists significant admissible evidence discrediting father

If the court did discredit father's testimony, it had ample other reasons to do so. For example, father testified that child never saw an unsafe situation, in stark contrast to child's own testimony regarding experiences with his babysitters. father testified that his relapse on crack cocaine in 2012 only lasted for a couple of months; but, this was in direct contradiction to the indictment. father testified that child "might have been tardy a few times," but was not regularly absent from school; but, this was contradicted by child's attendance records and the testimony of his former teachers. father testified that he had no concerns for child 's development or medical needs at the time he left him in grandmother's care , despite evidence that child's teacher had recommended occupational therapy, child had multiple untreated medical conditions, and child had not seen a dentist in at least three years. father testified that he brought child for annual checkups in , but that testimony was contradicted by child's medical records, and undermined by father's own

testimony that "[child didn't go [to the doctor] regularly," that he brought him to the hospital when he was sick, and his inability to name child's providers.

II. APPELLANT father WAS PROVIDED WITH A MEANINGFUL OPPORTUNITY TO BE HEARD AT THE TRIAL

father argues that the probate court violated his due process rights "by rejecting portions of his testimony without visibly assessing his demeanor and credibility." (father Blue Br. 29). His argument is misplaced.

"When the State seeks to terminate the relationship between a parent and child, it must do so by fundamentally fair procedures that meet the requisites of due process." In re Randy Scott B., 511 A.2d 450, 452 (Me. 1986); see also In re Alexander D., 1998 ME 207, ¶ 13, 716 A.2d 222, 226. "[P]roceedings to terminate that [parental] right are deserving of more elaborate procedural safeguards than are required for the determination of lesser civil entitlements." Id. Thus, "'[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.'" In re A.M., 2012 ME 118, ¶ 15, 55 A.3d 463, 468 (internal citation omitted). Following the United States Supreme Court precedent in Mathews v. Eldridge, 424 U.S. 319 (1976), "[a]pplied to hearing processes where significant rights are at stake, due process requires: notice of the issues, an opportunity to be heard, the right to introduce evidence and present witnesses, the right to respond to claims and evidence, and an impartial factfinder." In re Kristy Y., 2000 ME 98, ¶ 7, 752 A.2d 166, 169 (internal citations omitted).

father does not argue that he was not provided adequate notice of the issues or an impartial factfinder. However, he appears to argue that his due process rights were violated because he was not able to be visually assessed by the judge. His argument is unavailing. When a parent is known to be incarcerated, the court must provide a meaningful opportunity for the parent to participate in the hearing, such as in person, *by telephone* or video, or through deposition. See In re A.M., 2012 ME 118, ¶ 20, 55 A.3d at 469 (emphasis added).

As an initial matter, father did not have a constitutional right to physically be present, or be present via video conference, at the termination hearing. See In re Jo-Nell C., 493 A.2d 1053, 1055 (Me. 1985)(emphasis added)("The due process to which a parent in a child custody proceeding is entitled *does not rise* to the same level as that accorded the defendant in a criminal prosecution."). Rather, due process requires father to have a meaningful opportunity to be heard. See, e.g., In re Adden B., 2016 M 113, ¶ 7, 144 A.3d at 1160. The probate court, in deciding to proceed with father's participation via telephone, was not applying a maverick approach. See D.F. v. Florida Dept. of Children & Fam. Services, 877 So.2d 733, 734 (Fla. Dist. Ct. App. 2004)(finding D.F.'s due process rights would not have been violated had the court allowed D.F. to testify telephonically).[35] Some courts have found that even

[35] Other courts have proceeded in similar manners. See In the Interest of F.L.S., 502 S.E.2d 256, 257 (Ga. Ct. App. 1998)(finding the father's due process rights were satisfied by his opportunity to participate in a termination hearing by telephone, despite his request to attend in person or by live video); Orville v. Division of Fam. Services, 759 A.2d 595 (Del. 2000)(holding that due process is satisfied when the

when a parent is only able to participate in parts of the termination hearing by telephone, due process is not violated. See In re D.C.S.H.C., 2007 ND 102, ¶¶ 22-23, 733 N.W.2d 902, 909 (holding that incarcerated out-of-state mother's due process rights were not violated per Mathews v. Eldridge where she participated in a termination hearing via telephone).

The Court of Appeals of Indiana determined due process was satisfied by a father's participation by telephone in a termination hearing when it was discovered that the father's correctional facility lacked the equipment for a video feed, though the father requested an order to transport. See In re J.E., 45 N.E.3d 1243, 1254 (Ind. Ct. App. 2015). The Indiana court dismissed the father's assertion that taking his testimony by telephone would affect the court's ability to judge his credibility, finding that his case did not turn on the resolution of a factual dispute between the father and the Department of Child Services. Id. at 1248. The probate court followed the same procedure when it was discovered that father was unable to participate by video, proceeding with his participation telephonically, and clearing the courtroom to afford father the opportunity to consult with his attorney throughout the trial. As in the Indiana case, the probate court's decision did not turn on the resolution of a factual dispute based on one witness's credibility versus another's. There was ample

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incarcerated parent has the opportunity to participate in the entire hearing by telephone); see also In Interest of M.D., 921 N.W.2d 229, 235-36 (Iowa 2018)(adopting the standard that incarcerated parents must have the opportunity to participate in the entire termination hearing by telephone or other means of communication that enables the parent to hear the testimony and arguments).

unrebutted evidence to support the court's findings without having to resolve those areas in which father's testimony differed from the testimony of other witnesses.

father argues that "courts . . . have overwhelming [sic] held that, *when a witness's credibility is of central importance*, due process requires fact-finders to visually assess it." (father Blue Br. 31). However, not one of the cases cited by father (father Blue Br. 31-32, fn. 18), support his contention that due process requires a visual assessment of a parent in a termination case.[36] father cites Melanie M. v. Winterer, 862 N.W.2d 76 (Neb. 2015), a case relating to a non-incarcerated parent's request for an in-person administrative hearing. While the Nebraska court noted that an "officer is deprived of the full range of demeanor evidence" in a telephonic hearing, the court went on to say that the "question here, though, is not whether the in-person observation of witnesses has value—it does—but whether its value is so great that the Due Process Clause requires it in [appellant's] welfare appeals." Id. at 84. The court then held that a face-to-face hearing was not constitutionally required. Id. at 84; see also In re Jonathan P., 819 A.2d 198, 200-01 (R.I. 2003)(discussing incarcerated parent's acceptable forms of participation to protect due process rights in a termination hearing).

[36] In the majority of cases cited by father the courts were deciding whether an un-incarcerated party was entitled to an in-person hearing in an administrative proceeding, regularly conducted telephonically, relating to welfare benefits or drivers' licenses.

In support of his argument that "this case came down to whether the court believed Petitioners' allegations of unfitness or [father's] testimony refuting them," father cites two examples in which father disputed Petitioners' allegations: (1) that he "made feeble attempts to communicate with child and (2) that he "was plotting to terminate the guardianship as soon as he is released from prison." (father Blue Br. 32). Neither of these areas were determinative.

With respect to father's communication with child there was ample documentary evidence presented by the aunt and uncle and father detailing the infrequency of father's text messages. There was no dispute that father sent just four or five letters to child between May 2017 and August 2019, all of which were sent after father was served with discovery. There was no dispute that father only had five phone calls with child from January 1, 2018 to August 13, 2019. The only question was whether father may have attempted a few more phone calls. father testified only vaguely that he had tried phoning more often and could not get through, but did not offer any details as to when those alleged attempts to call had occurred or how many times he had tried. Even if the court credited father's testimony that he tried calling more times than he actually reached child the court would still have been within its discretion to conclude that father's efforts were not sufficiently meaningful and that he had abandoned child. This factual "dispute" certainly would

not have impacted the court's conclusion that father is not in a position to take responsibility for child within a time reasonably calculated to meet child's needs.

The court gave no indication whether it gave any consideration whatsoever to the concern expressed by the aunt and uncle that father might seek to terminate the guardianship upon his release from prison. Rather, the court relied on father's own testimony about his future plans to determine that father is not in a position to take responsibility for child within a time reasonably calculated to meet child's needs.

III. THE PROBATE COURT DID NOT ABUSE ITS DISCRETION IN ITS ORDER TERMINATING APPELLANTS' PARENTAL RIGHTS

This Court reviews the factual findings underlying a termination of parental rights order for clear error and the ultimate decision to terminate parental rights for an abuse of discretion. Adoption of Isabelle T. et al., 2017 ME 220, ¶ 30, 175 A.3d at 648. The Court will determine that a finding is unsupported only if there is no competent evidence in the record to support it; if the fact-finder clearly misapprehended the meaning of the evidence; or if the finding is so contrary to the credible evidence that it does not represent the truth of the case. Id. (citing Guardianship of Hailey, 2016 ME 80, ¶ 15, 140 A.3d 478.) When fundamental rights are at stake, findings may be determined to be insufficient or the court may be found to have erred in the exercise of its discretion if important issues that arise during trial are not addressed in the record or in the court's findings. Id.

A. The probate court's factual findings are supported by the record.

On a Petition for Termination of Parental Rights and Responsibilities, pursuant to 18-C M.R.S. § 9-204, the petitioner must prove by clear and convincing evidence that the non-consenting parent has been unwilling or unable to take responsibility for the child within a time which is reasonably calculated to meet the child's needs and/or that the child has been abandoned, and that termination is in the child's best interest. See 22 M.R.S. §§ 4055(1)(B)(2)(a), (b)(ii), (b)(iii) (2018). The court's findings that Appellants abandoned child were unable or unwilling to take responsibility for child within a time calculated to meet his needs, and that termination was in child 's best interest are supported by competent evidence.

1. There is sufficient evidence to support the conclusion that father has been unwilling or unable to take responsibility for child within a time that is reasonably calculated to meet child's needs.

The only basis on which father argues that the court erred in finding he is unwilling or unable to take responsibility for child within a reasonable time is "by not concluding that, by virtue of the guardianship he consented to, [father] *is* providing for child's needs." (father Blue Br. 36). father does not challenge the court's findings that he, personally, will be unable to care for child within a time reasonably calculated to meet child's needs, but rather asks this Court to "follow[] the lead of the Texas Supreme Court," and "acknowledge that parents who are incarcerated may nonetheless adequately provide for their children's needs by

making appropriate arrangements for the children to be cared for by others for the duration of the parents' incarceration." (father Blue Br. 36). In support for father's maverick approach, he cites In re H.R.M., 209 S.W.3d 105 (Tex. 2006),[37] in an effort to have this Court create new law in Maine. There is simply no support for father's contention in Maine jurisprudence.[38]

In Maine, this Court has repeatedly upheld the termination of parental rights of an incarcerated parent, despite the child being in the care or guardianship of another family member. See, e.g., Adoption of Hali D., 2009 ME 70, 974 A.2d 916 (upholding termination of incarcerated father so that the child's step-father could adopt); Adoption of L.E., 2012 ME 127, 56 A.3d 1234 (upholding termination of incarcerated mother's parental rights so that the child's legal guardian/grandparents could adopt); In re Jacob B., 2008 ME 168, 959 A.2d 734 (upholding termination of incarcerated father so that the child's step-father could adopt).

father argues that if the Court does not find that an incarcerated parent can meet a child's needs by making appropriate arrangements for them, it "will foreclose

[37] In re H.R.M. does not even clearly support father's argument. In that case, the Texas court held that "absent evidence that the non-incarcerated parent agreed to care for the child *on behalf of the incarcerated parent*, merely leaving a child with a non-incarcerated parent does not constitute the ability to provide care." Id. at 1110 (emphasis added); see also Interest of J.G.S., 574 S.W.3d 101, 119 (Tex. 2019)(distinguishing between a relative who cares for the child on the relative's own behalf with a relative who cares for the child as part of a working relationship with the incarcerated parent).

[38] There is also no factual support for father's implication that he is somehow responsible for the guardianship. The evidence at trial was that father left child with grandmother with just a few days' notice and without any indication of how long he would be gone. He did not formalize any guardianship at that time. The guardianship that now exists was initiated by , aunt and uncle their efforts that child is doing so well.

an incarcerated parent's chances of retaining his or her parental rights across the board." (father Blue Br. 36). However, if the Court were to find that simply making arrangements for another party to care for a child during a parent's incarceration or unavailability were sufficient basis to find that a parent was fit, it would remove all personal responsibility of the incarcerated parent to maintain a relationship with their children and leave children in limbo for extended periods of time.

father seeks to reassure this Court that the guardianship provides child with stability and something close to permanency, asserting that father "could only terminate the guardianship if doing so was in the best interest of child" (father Blue Br. 37). father, however, misstates the law.[39] The Law Court has set out a framework relating to the burdens of proof when a party seeks to terminate a guardianship, which has been codified by the Legislature in 18-C M.R.S. § 5-210. See In re Guardianship of Stevens, 2014 ME 25, ¶ 14, 86 A.3d 1197, 1202. While the parent petitioning for termination bears the burden of proving that termination would be in the best interest of the child, the party opposing termination of the guardianship bears the burden of proving that the parent seeking to terminate the guardianship is currently unfit to regain custody of the child. Id. If the party opposing termination fails to meet their burden of proof regarding parental unfitness,

[39] mother similarly incorrectly states the law, asserting that if father wanted to terminate the guardianship that he would have to "prove he was a fit parent" as well as best interest. (mother Blue Br. 22).

"the guardianship must terminate for failure to prove an essential element to maintain the guardianship." Id., 18-C M.R.S. § 5-210(7).

The court properly considered the length of father's incarceration, the length of time before father believed he might be able to take responsibility for child, his past neglect of child's educational, medical, developmental, and social needs, and his ability to take responsibility for child within a time reasonably calculated to meet child's needs. See In re Hanna S., 2016 ME 32, ¶ 9, 133 A.3d 587, 593. child was just eight years old when father left him in the care of his grandmother. child will be 15 or 16 years old before father believes—if everything goes according to plan—that he will be in a position to care for him. By that time, father will have been absent from child 's life longer than he was present. Should father seek to terminate the guardianship in the future, theaunt and uncle will have to prove that father remains unfit. If they fail to meet their burden, the court will have to terminate the guardianship and return child to father regardless of child's best interest. With this prospect, child does not achieve permanency, and instead must continue to worry that at some future date, he will leave the stable and secure care provided by the aunt and uncle for the care of father, who by that time may be more or less a stranger.

2. *There is sufficient evidence to support the conclusion that father abandoned child*

father contends that there is "ambiguity in the court's order about abandonment," and that "if this Court disagrees, . . . the court's conclusion that

[father abandoned child stretches the statutory meaning of abandonment beyond its breaking point and, therefore, does not represent the truth of the case." (father Blue Br. 37).

A parent abandons a child when he or she engages in any conduct showing an intent to forgo parental duties or relinquish parental claims. See 22 M.R.S. § 4002(1-A). Such an intent may be evidenced by a failure, for six months or more, to communicate meaningfully with the child or maintain regular visitation with the child. 22 M.R.S. §§ 4022 (1-A), 4055. "A mere 'flicker' of interest is not sufficient to bar a finding of abandonment." Adoption of Lily T., 2010 ME 58, ¶ 29, 997 A.2d 722, 728. A parent does not get a "'pass' on parental responsibilities as a result of being incarcerated." In re Asanah S., 2018 ME 12, ¶ 5, 177 A.3d 1273, 1275. A parent who is unable to fulfill his parental responsibilities by virtue of being incarcerated is entitled to no more protection from the termination of his parental rights than a parent who is unable to fulfill his parental responsibilities as a result of other reasons." Id.

This Court has drawn comparisons between incarcerated parents and parents prohibited from contacting their children pursuant to a court order in the context of abandonment. See Adoption of Lily T., 2010 ME 58, ¶ 21, 997 A.2d at 726 ("The situation is in some ways analogous."). In such cases, a parent is obligated to make "an even greater effort to foster a nurturing relationship" with the child "using the

means available" if he wants to maintain a relationship with the child. Id., at ¶ 21 (citing In re Baby Duncan, 2009 ME 85, ¶ 11, 976 A.2d at 939); see also Adoption of Hali D., 2009 ME 70, ¶ 2, 974 A.2d at 917. "If a parent engages in voluntary conduct that he 'knew or should have known, would necessarily and inexorably lead to the loss of opportunity to see his child, then one could find that this conduct – and hence the resulting lack of contact with the child – manifested an intent on the part of the [parent] to abandon the child.'" Id., at ¶ 22.

father has been largely removed from child's life since May 2016. As a result of his own criminal acts, nearly four years have passed where child has not seen his father. Since child moved in with the aunt and uncle in May 2017, nearly three years ago, father has sent just four letters to child with one sent right after service of discovery, two sent just prior to trial, and one sent shortly after the first two days of trial. Until June 2018, father texted child but sporadically, with sometimes weeks or months going by without contact. father and child have spoken on the phone just a handful of times in three years. Despite father's excuses that communication is costly and not always accessible, father has been able to communicate regularly, approximately twice per month, with E.B. and C.B., friends who send him money. He chose to write to C.B. from solitary confinement, but not his son. It was within the court's reasonable discretion to find that father's sporadic letters

and calls in the last two years did not constitute an effort to maintain meaningful contact with child by all means available.

3. *There is sufficient evidence to support the conclusion that mother is unfit.*

mother asserts that there was insufficient grounds to terminate her parental rights because she sent a few letters and cards to child,[40] she spoke to him via phone and video chat,[41] and child remembers having contact with her. (mother Blue Br. 15). There was ample evidence to support the court's finding that mother has had no meaningful contact with child since his birth, and has never had a relationship with him. The evidence was overwhelming that she abandoned child and clear that she has been unwilling or unable to take responsibility for child within a time that is reasonably calculated to meet child's needs.

4. *There is sufficient evidence to support a finding that termination is in child's best interest.*

father suggests to the Court that because "*all* or *virtually all* guardianships of minors involve parents who, for whatever reason, are currently unable to meet their children's needs," "[t]he court's ruling here – that such a guardianship is not good enough for those children – would, if applied in future cases, categorially render the

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[40] mother cites to mother's Exhibits 1 through 4 in support of this contention, but three of the four exhibits were not letters or cards to child but to aunt or uncle. The only evidence that mother wrote to child was a letter sent to him in May 2017 (Pet'rs' Ex. 3), and a single birthday card sent for child's birthday in November 2018 (mother Ex. 4).

[41] Any phone or video contact occurred when child was in father's care prior to Memorial Day weekend 2016.

best-interests analysis a foregone conclusion." (father Blue Br. 40). father appears to suggest that the court's best interest analysis was based solely out of concern that father may someday try to terminate the guardianship. (father Blue Br. 39). The court's decision does not support father's assertions.

This Court gives "very substantial deference" to the trial court, who is able to directly evaluate the testimony of witnesses. See In re Michaela C., 2002 ME 159, ¶ 27, 809 A.2d 1245, 1253. Upon review for an abuse of discretion, the Law Court asks: "(1) whether factual findings, if any, are supported by the record pursuant to the clear error standard; (2) whether the court understood the law applicable to its exercise of discretion; and (3) given the facts and applying the law, whether the court weighed the applicable facts and made choices within the bounds of reasonableness." Hutt v. Hanson, 2016 ME 128, ¶ 15, 147 A.3d 352, 355.[42] Also relevant to the best interest determination is the harm the child may suffer if the parent's rights are not terminated, as well as the child's need for permanence and stability. In re Jacob B., 2008 ME 168, ¶ 14, 959 A.2d 734, 738; see also Adoption of Lily T., 2010 ME 58, ¶ 37, 997 A.2d at 729.

The probate court's decision contrasts how well child is doing in the aunt and uncle's care with father's care, noting that in father's care, child "did not

[42] Even though parental unfitness and a child's best interest are separate elements of a termination case, the court's findings that bear on parental unfitness may also be relevant to the question of whether termination is in the child's best interest. In re Ashley A., 679 A.2d 86, 89 (Me. 1996).

receive regular medical and dental care, had substantial absences from school, did not do homework assignments, would fall asleep in school, and performed below grade level," and "experienced negative emotional and social development." (A. 9). The court noted that when child came into his grandmother's care in 2016, "he had trouble with many simple life skills like brushing his teeth, holding a fork, tying his shoes, riding a bike, running and blowing his nose" and he "struggled with maintaining hygiene, lacked confidence, was shy, struggled socially and was prone to anger outbursts." (A. 7). The court also made findings related to father's drug-related criminal offenses, his lack of meaningful contact with child, his minimal efforts to maintain a relationship with child, as well as father's present and future ability to have a relationship with child (A. 8-9). All of those findings were supported by competent evidence in the record and support the conclusion that termination is in child's best interest.

The best interest of the child analysis also appropriately accounts for the fact that child is thriving in the care of aunt and uncle. He has a positive, loving relationship with his aunt and uncle, and no one disputes that they are meeting all of his needs and providing him with a structured and safe home. In short, the evidence provided the court with considerable support for the conclusion that termination of the Appellants' parental rights is in child 's best interests and the court did not commit clear error or abuse of its discretion in doing so.

B. The probate court understood the law applicable to its exercise of discretion and weighed the applicable facts and made choices within the bounds of reasonableness.

father does not appear to argue that the probate court abused its discretion, and there is simply no indication to support such an assertion. mother asserts that the court abused its discretion in finding termination was in child's best interest, because the court "*must* assume in making its decision that child will never speak to or see either parent again."[43] Though the court would have acted within its discretion in crediting the aunt and uncle's testimony that they will act in child's best interest with respect to such contact, the court gave no indication whether, or to what extent, it considered whether the aunt and uncle would support future contact with Appellants. There is no evidence the court failed to consider that the aunt and uncle may decide to withhold future contact with Appellants. mother also asserts that the court erred by not making findings as to why the current guardianship is insufficient to meet child's needs. There was no requirement that the court make such findings.

CONCLUSION

Accordingly, Appellees respectfully request this Honorable Court affirm the order of probate court and that this matter be remanded to the probate court for finalization of the adoption.

Respectfully submitted,

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[43] mother offered no legal basis for this contention.

March 17, 2020

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Certificate of Service

I certify that on this date I caused to be served two copies of this Brief of the Appellee on counsel for the Appellants by mailing the same, U.S. Mail, first class and postage prepaid, at the addresses listed on the briefing schedule. I emailed a PDF copy of the brief to lawcourt.clerk@courts.maine.gov and to the above-noted attorneys at the email addresses provided to me by them.

March 17, 2020

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